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No. 02-1173

IN THE

Supreme Court of the United States

METROPOLITAN TRANSPORTATION AUTHORITY,
Petitioners,

v.

SEAN GREENE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE AMERICAN PUBLIC TRANSPORTATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

The Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, provides a comprehensive remedial scheme for employees of common carriers by railroad injured in the course of their employment due to the negligence of their employers. This case presented two significant questions for review:

First, whether the Eleventh Amendment to the United States Constitution protects public transit agencies created by state law from liability under FELA for injuries suffered by their employees.

Second, whether FELA extends to public transit agencies who do not operate interstate railroads themselves, but that have subsidiaries or contractors that are "common carrier[s] by railroad."

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BRIEF OF THE AMERICAN PUBLIC TRANSPORTATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The American Public Transportation Association ("APTA"), as *amicus curiae,* supports the Petition of Metropolitan Transportation Authority ("MTA") for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.[1] Counsel for both parties have given their consent for APTA to file this brief, and verification of that consent has been filed with the Court.

[1] No party to this case had any role in drafting this brief, or provided any monetary support for its preparation or filing. *See* Supreme Court Rule 37.6. Petitioner Metropolitan Transportation Authority, however, is a dues-paying member of APTA.

INTEREST OF *AMICUS CURIAE* AMERICAN PUBLIC TRANSPORTATION ASSOCIATION

APTA is a non-profit trade association of more than 1,500 public and private member organizations responsible for planning, designing, constructing, financing and operating public transportation systems. APTA's members include state associations, academic institutions, state departments of transportation, public transit agencies, metropolitan planning organizations and businesses that supply products and services to the public transportation industry.

The decision below threatens to upset the established expectations of the 17 public transit agency members of APTA that provide commuter rail service as part of the public transportation system with respect to the coverage of their employees under FELA.

First, many public transit agencies are creatures of the State and therefore enjoy sovereign immunity from suit under federal causes of action. The decision below would subject such agencies to suit under FELA contrary to sovereign immunity principles under the Eleventh Amendment of the U.S. Constitution as reaffirmed by this Court in *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002) and *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468 (1987).

Second, the commuter rail operations of many public transit agencies nationwide (like the MTA) are performed by a separate division or subsidiary of the agency, or an independent contractor. These public transit agencies provide certain management services and establish policies for the commuter rail operations, but many of them do not themselves directly operate the trains.

Third, the decision below conflicts with findings and decisions of the Railroad Retirement Board, the Interstate Commerce Commission (now the Surface Transportation Board) and the National Mediation Board that have not found public transit agencies to be covered by the rail statutes they administer. These other rail statutes apply the same "carrier" test as FELA.

STATEMENT OF THE CASE

This case arises from a car accident in which Plaintiff-Respondent Sean Greene claims he was injured during the course of his employment duties. At the time of his injury, Greene was a police officer employed by MTA, a public benefit corporation created pursuant to the laws of the State of New York. Greene filed this case in the United States District Court for the Eastern District of New York, seeking damages for his work related injury from MTA under FELA. *See Greene v. Long Island R.R. Co.*, 99 F. Supp. 2d 268 (E.D.N.Y. 2000), Petitioner's Appendix[2] at 32a-45a, *aff'd* 280 F.3d 224 (2d Cir.), Pet. App. at 1a-28a, *reh'g denied en banc*, No. 009292 (2d Cir. Nov. 13, 2002), Pet. App. at 46a-47a.

MTA was created by the Legislature of the State of New York in 1965 under the State's Public Authorities Law, N.Y. Pub. Auth. L. § 1263(1)(a) (McKinney 1999). MTA's statutory responsibilities include "the continuance, further development and improvement of commuter transportation and other services related thereto within the metropolitan commuter transportation district, *including but not limited to such transportation by railroad*, omnibus, marine and air." *Id.* § 1264(1) (emphasis added).

The Legislature of the State of New York granted MTA the power to "acquire . . . any transportation facility," *id.*, and to "operate, maintain, renovate, improve, . . . or repair" such a facility and "lease railroad cars for use in its passenger service." *Id.* § 1266(2) & (7). MTA is authorized to levy and collect fares and to establish schedules, standards

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[2] Hereinafter citations to Petitioner's Appendix will be abbreviated "Pet. App."

of operation and public safety rules and regulations as necessary for the "use and operation of any transportation facility." *Id.* § 1266(3). MTA is also authorized to provide and maintain a police department for all MTA affiliates. *See id.* § 1266-h(1). MTA may exercise these powers itself or it may "cause one or more of its powers . . . to be exercised or performed by . . . one or more wholly owned subsidiary corporations." *Id.* § 1266(5).

MTA owns two subsidiaries that operate commuter railroads: the Long Island Railroad ("LIRR") and Metro-North Commuter Railroad Company ("Metro-North"). MTA does not operate any railroad system or services itself.

MTA filed a motion for summary judgment in the District Court, arguing that it is not a proper defendant under FELA because it is not a common carrier by railroad. *See Greene*, 99 F. Supp. 2d at 270, Pet. App. at 32a. The District Court denied that motion. *See id.* at 275, Pet. App. at 45a. The District Court found that by virtue of MTA's "extensive involvement" in LIRR's activities, MTA "operates" the LIRR's railroad. *Id.* at 274, Pet. App. at 43a. The District Court held that "it is not the corporate form of the entity" that determines an entity's status under FELA, but rather the "functions" it performs. *Id.* at 272, Pet. App. at 37a. The District Court held that FELA requires "nothing more" on the part of a parent "than to 'perform a function'" in connection with the subsidiary's railroad activities. *Id.* at 274, Pet. App. at 42a.

At MTA's request, the District Court certified the question of whether MTA is a common carrier under FELA to the United States Court of Appeals for the Second Circuit. *See Greene*, 280 F.3d at 229, Pet. App. at 7a. The Court of Appeals granted MTA's motion for leave to appeal pursuant to 28 U.S.C. § 1292(b), but ultimately affirmed the District Court. *See id.* at 229, 240, Pet. App. at 7a, 28a. The Court of Appeals found that FELA liability extends to any entity

that is substantially involved in the "management and operation of the business" of a railroad, and is therefore not limited to the owner or operator of the railroad. *See id.* at 230, Pet. App. at 8a. MTA timely filed a Petition for Rehearing with the Court of Appeals. *See* Pet. App. at 46a-47a.

Thereafter and following this Court's recent decision in *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), MTA filed a motion with the Court of Appeals to remand the case to the District Court with instructions to dismiss Respondent's claims against MTA on the grounds that the Eleventh Amendment to the United States Constitution protects MTA from FELA suits by its employees. *See* Pet. App. at 29a-31a.

On November 13, 2002, the Court of Appeals denied MTA's petition for rehearing. *See id.* at 46a-47a. On January 21, 2003, the Court of Appeals denied MTA's motion to vacate, remand and dismiss on Eleventh Amendment grounds. *See id.* at 29a-31a. MTA's timely Petition for a Writ of Certiorari from this Court followed.

REASONS FOR GRANTING THE WRIT

1. The Court should grant a writ of certiorari to review the question whether a public transit agency created by state law is entitled to assert Eleventh Amendment immunity from suit in an action brought by an employee under FELA. As Petitioner correctly points out, the decision below threatens the sanctity and stability of the treasuries of the States and is therefore at odds with this Court's recent jurisprudence confirming the immunity of the States from suit absent their consent. We will not repeat Petitioner's arguments here.

The decision of the court below effectively requires the obligation of state moneys to pay twice for the same injury to one of its citizens.[3] The courts of the United States simply lack that power, unless it is conferred specifically by an amendment to the U.S. Constitution adopted subsequent to the Eleventh Amendment. That is not the case here. FELA, the statute under which Respondent will receive his second recovery if this decision is allowed to stand, was enacted pursuant to Congress' powers under the Commerce Clause. *See Mondou v. New York, New Haven & Hartford R.R. Co.*, 223 U.S. 1 (1912) (upholding constitutionality of FELA under commerce clause powers).

As this Court has consistently held in recent years, Congress lacks the authority under its commerce power to abrogate the states' immunity from suit, even when the statute purporting to subject the state to suit involves interstate or international transportation. *See, e.g., Federal Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S.

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[3] In the case below, Respondent received workers compensation payments prior to asserting his FELA claim. *See* Petitioner's Brief at 2-3.

743 (2002); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Welch v. Texas Dep't of Highways & Public Transp.*, 483 U.S. 468 (1987). The Court's recent jurisprudence confirms that neither MTA, nor any other public transit agency, waives that immunity by operating a railroad. *See College Savs. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 681-85 (1999) (holding that state does not waive immunity from suit by participating in interstate commerce). It is illogical to suggest that a public transit agency can do so by being a parent of an entity that operates a railroad. To hold a parent liable when its subsidiary operates a railroad, when the parent would be immune if it operated the railroad itself is nonsensical and creates a conflict with the Court's holding in *Welch* in which the Court held that the Texas Department of Highways and Public Transportation was immune from suits by its employees under the Jones Act.[4]

Article III of the Constitution of the United States gives the judiciary no more power to encroach upon the sovereignty of the States than it has in an action against the

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[4] Section 33 of The Merchant Marine Act of 1920, commonly known as the "Jones Act," 46 U.S.C. app. § 688, incorporates FELA by reference and makes FELA remedies available to seaman. *See Welch*, 483 U.S. at 471. As the Court recognized in overruling *Parden v. Terminal Railway of Alabama Docks Department*, 377 U.S. 184 (1964), the immunity issues in the Jones Act and FELA are symmetrical. *See Welch*, 483 U.S. at 471.

United States.[5] This principle, confirmed by the people of the United States in the Eleventh Amendment to the U.S. Constitution, has properly guided this Court's recent jurisprudence under that Amendment. This case involves the application of that principle.

This principle is one of the most fundamental in the constitutional structure of the United States. The Constitution of the United States through the Appropriations and Property Clauses, U.S. Const. art. I, § 9, cl. 7; *id.* art. IV, § 3, cl. 2, reserves the power to collect and spend public moneys exclusively to the elected representatives of the people. Analogous provisions in the constitutions of the majority of the several states, at least one of which predates the Constitution of the United States, do the same.[6] Therefore, unless the strict test articulated by the Court in *Seminole* is met, *see Seminole Tribe of Fla.*, 517 U.S. at 55, neither the judiciary nor the executive has the power to

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[5] Just as the States are immune from private suits, the Court subscribes to the "universally received opinion . . . that no suit can be commenced or prosecuted against the United States." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-42 (1821). Of course, the United States obtained its sovereign authority, and its very name, by assignment from the States, and whatever attributes of sovereignty are inherent in one must necessarily be inherent in the other. *See Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (recognizing that the States adopted the Constitution which "created a Federal Government of limited powers" and retained the States' "numerous and infinite" powers). In *Hans v. Louisiana*, 134 U.S. 1, 17 (1890), the Court explained the principle of sovereign immunity as one and the same for both the States and the United States.

[6] *See* S.C. Const. art. XVI (1778), *available at* <http://www.yale.edu/lawweb/avalon/states/sc02.htm> (last visited Apr. 7, 2003). The current constitution of the State of New York contains an appropriations clause similar to that found in the U.S. Constitution. *See* N.Y. Const. art. VII § 7.

abrogate a State's immunity from suit and order that money from a state's public fisc be paid to a private individual. That strict test is not met when a state public transit agency or one of its subsidiaries or contractors operates a railroad.

Had Respondent's FELA action been brought against a federal agency, there is no doubt that the federal government would be immune from the suit absent a specific waiver of sovereign immunity.[7] This is particularly significant given the federal Department of Transportation's substantial ownership in and oversight of Amtrak. *See* 49 U.S.C. §§ 24302, 24304(d)(1). Simply because Amtrak itself may be exposed to FELA liability for work related injuries of its employees, it does not follow that the DOT is also exposed or that the federal government has waived its immunity from suit through its oversight of Amtrak. Nor have the States or their public transit agencies waived their immunity from suit under FELA by operating commuter railroads or by having subsidiaries that do. *See College Savs. Bank*, 527 U.S. at 681-85; *Welch*, 483 U.S. at 476-78.

2. The Court should also grant the petition to clarify whether the performance of certain management functions by a public transit agency for a subsidiary that is a "common

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[7] For example, the statutory history and the application of the Jones Act to the United States establishes that the United States did not waive its sovereign immunity by enacting FELA. This Court's jurisprudence has recognized that absent the waivers of sovereign immunity in the Suits in Admiralty Act, 46 U.S.C. app. §§ 741-752, and the Public Vessels Act, *id.* §§ 781-790, the United States would be immune from suit under the Jones Act. *See, e.g., Hust v. Moore-McCormack Lines, Inc.*, 328 U.S. 707 (1946), *overruled in part on other grounds Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783 (1949) (recognizing that Congress waived sovereign immunity of United States for Jones Act claims through Suits in Admiralty Act).

carrier by railroad" makes the public transit authority itself a "common carrier by railroad."

To be an employer covered by FELA, an entity must be (1) a common carrier; (2) a railroad; and (3) engaged in interstate or foreign commerce. *See* 45 U.S.C. § 51. The issue presented here is when, if ever, a parent organization that does not actually run the trains becomes a "railroad" subject to FELA liability.

The Court has twice before addressed the "railroad" element. In *Wells Fargo & Co. v. Taylor*, 254 U.S. 175 (1920), the plaintiff's employer was a common carrier engaged in interstate commerce. The plaintiff worked in a railway express car that was part of a train operated by a railroad company. He brought suit under FELA against his employer, Wells Fargo, for injuries he suffered in a derailment.

The Court held that the employer was not an FELA employer because a railroad is:

> one who operates a railroad as a means of carrying for the public — that is to say, a railroad company acting as a common carrier. This view not only is in accord with the ordinary acceptation of the words, but is enforced by the mention of cars, engines, track, roadbed, and other property pertaining to a going railroad; by the obvious reference in the latter part of sections 3 and 4 to statutes requiring engines and cars to be equipped with automatic couplers, standard drawbars and other appliances intended to promote the safety of railroad employés; by the use of similar words in closely related acts which apply only to carriers operating railroads; and by the fact that similar words in the original Interstate Commerce Act had been construed as including carriers operating railroads but not express companies doing business as here shown.

Id. at 187-88 (internal citations omitted).

The question of the kind of employer covered by FELA next came before the Court in *Edwards v. Pacific Fruit Express Co.*, 390 U.S. 538 (1968). In *Edwards*, the plaintiff's employer owned, maintained and leased refrigerator cars used to transport perishable goods in interstate commerce. The company repaired its own cars, and owned buildings and switching tracks for that purpose. *See id.* at 539. It serviced the cars while they were operating in interstate commerce and controlled their eventual destination, but the cars themselves were moved in trains operated by railroad companies. *See id.*

Although the Court agreed that "it is undoubtedly true that [the company] performs some railroad functions," it held that it was not a railroad within the meaning of FELA. The Court noted "that there exist a number of activities and facilities which, while used in conjunction with railroads and closely related to railroading, are yet not railroading itself." *Id.* at 540. To be liable under FELA, the plaintiff's employer must do more than "perform[] some railroad functions," it must be a "going railroad." *Id.* at 539-40.

The test the Court articulated in these cases restated the statutory wording without giving specific insight into what makes an entity a "railroad," other than to say that it must be a "going railroad" "operated" by the entity the plaintiff was seeking to hold liable under FELA. *See Edwards*, 390 U.S. at 540; *Taylor*, 254 U.S. at 187-88. At least since *Taylor* was handed down in 1920, it has been commonly accepted

that to be a "railroad" an entity actually had to run the trains.[8]

In reliance on these decisions, the States have structured their public transit agencies in such a way as to provide a sharp demarcation between entities that are unquestionably railroads (such as the LIRR) and other transit operations that are not (such as toll bridges or bus services). Some public transit agencies, like MTA, have commuter railroads as subsidiaries; others, such as APTA member Southeastern Pennsylvania Transportation Authority, organize their railroads as separate divisions. *See Felton v. Southeastern Pa. Transp. Auth.*, 952 F.2d 59, 60 (3d Cir. 1992). Still others, such as APTA member Massachusetts Bay Transportation Authority, contract with outside railroads to provide the actual transportation services. *See* Mass. Gen. Laws ch. 161A § 3(f) (West 2000).

Regardless of the exact legal relationship between the public transit agencies and the entities that actually run the trains and other transportation services, the "parent" organization typically provides overall management functions, such as finance, budgeting, marketing, labor relations and real estate, for all of the modes of transportation offered. In the case of MTA (and many other

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[8] *See, e.g., Iverson v. Southern Minn. Beet Sugar Coop.*, 62 F.3d 259 (8th Cir. 1995) (holding that factory owner with in-plant railroad not subject to FELA liability); *Sullivan v. Scoular Grain Co. of Ut.*, 930 F.2d 798 (10th Cir. 1991) (holding that joint venture that owned tracks but did not operate railroad not subject to FELA liability); *Chaneyfield v. City of N.Y.*, 525 F.2d 1333, 1337-38 (2d Cir. 1976) (holding that operating much cars in a tunnel project does not subject employer to FELA liability); *cf. Lone Star Steel Co. v. McGee*, 380 F.2d 640 (5th Cir. 1967) (holding that steel company was subject to FELA liability because it owned and operated railroad equipment and performed rail services itself).

APTA members) the public transit agency also provides security for all of its operations — railroad, buses, bridges and the like.

A primary purpose of centralizing such functions is to provide cost-effective management and overall policy guidance for all mass transportation services on a regional basis. In many cases, the public transit agency assumed ownership over what were previously privately-owned transportation companies that simply could not provide the services at a profit. Public transit agencies are able to provide comprehensive transportation solutions, raise money to rehabilitate old facilities and build new ones with taxpayer-backed bond issues or local tax revenues, and cut costs through centralized and coordinated management. Moreover, in these perilous times, public transit agencies can allocate resources for security of the traveling public where they are most needed.

The court below very broadly held that the MTA is a "common carrier by railroad" because, in its analysis, there is more to the operation of the business of a railroad "than the operation of the transportation facilities themselves." *Greene*, 280 F.3d at 240, Pet. App. at 27a.

If the courts below had found that Respondent was an employee of the LIRR because he was a borrowed servant, or acting for the MTA and the LIRR simultaneously, then we know what the proper test for determining whether he was covered by FELA would be.[9] But the Court of Appeals did not take this position. Rather than consider *the employee's*

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[9] *See Kelley v. Southern Pac. Co.*, 419 U.S. 318, 325-26 (1974) (holding that person not employed by a railroad but providing services to the railroad does not satisfy FELA's requirement that he was injured "while employed by" railroad unless he meets the common law "borrowed servant" test).

relationship to the LIRR (i.e., whether he was a borrowed servant of the LIRR), the court below focused instead on *the employer's relationship to the LIRR*. That cannot and should not be a proper consideration.

3. If MTA and entities like it are held to be "going railroads," then FELA will displace workers compensation or similar laws applicable to state employees for far more than just police or security forces guarding parking lots, depots and bridges.[10] The Court initially interpreted FELA to require a plaintiff employee to show that "at the moment of injury" he or she was engaged in an activity that constituted interstate commerce. *See, e.g., Shanks v. Delaware, Lackawanna & W. R.R. Co.*, 239 U.S. 556, 557-58 (1916). Congress amended the statute in 1939 to broaden the category of covered employees to include not just persons who were actually engaged in interstate or foreign commerce at the time of their injury, but also persons any part of whose duties were in the furtherance of, or "directly or closely and substantially" affected such commerce. Act of August 11, 1939, 53 Stat. 1404 (1939). The amendment was "designed to obliterate fine distinctions" based upon what tasks the employee was performing at the time of injury. *Reed v. Pennsylvania R.R. Co.*, 351 U.S. 502, 505 (1956); *see also* Senate Committee on the Judiciary, Amending the Employers' Liability Act, S. Rep. No. 661, 76th Cong., 1st Sess. 2-3 (1939).

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[10] For example, the Georgia Court of Appeals recently confirmed that employees of APTA member Metropolitan Atlanta Rapid Transit Authority are covered by the Georgia Workers Compensation Act rather than the Georgia Employers' Liability Act (which is modeled on FELA). *See Williams v. Metropolitan Atlanta Rapid Transit Auth.*, 542 S.E.2d 199 (Ga. Ct. App. 2000).

As a result of the 1939 amendment, FELA was extended to cover clerical personnel and others who are not exposed to the special hazards of the railroad industry. *See Reed*, 351 U.S. at 505-06. Indeed, anyone who worked for a "common carrier by railroad" engaged in interstate or foreign commerce became entitled to assert the remedies provided by FELA because the "benefits of the Act are not limited to those who have cinders in their hair, soot on their faces, or callouses on their hands." *Id.* at 506.

APTA's member public transit agencies have been organized in large part on the basis that employees who did not work directly for the entity providing rail services were not covered by FELA. Thus, injured employees who worked for public transit agencies (as opposed to the subsidiaries or divisions directly operating the trains) were covered under workers compensation laws, or the equivalent for state employees. If the decision below is allowed to stand, then employees of public transit agencies could be considered employed by a "going railroad," and thus able to sue in state or federal courts for damages under FELA. Not only would such a result displace settled expectations, it would disrupt legal relations carefully constructed by state laws.

The financial effects of altering the basis of liability from a no-fault system of defined workers compensation benefits to a fault-based tort system may be devastating. FELA's "featherweight" burden of proof — coupled with the availability of tort damages for not only medical expenses and lost wages, but also damages for pain, suffering and mental anguish — will increase the likelihood of large, unpredictable judgments. *See, e.g., Norfolk & W. Ry. Co. v. Ayers*, __ U.S. __, No. 01-963 (Mar. 10, 2003). The public transit agencies' present insurance coverage will have to be extensively revised to shift from much cheaper workers

compensation coverage to liability insurance covering tort claims.[11] For those entities that are self-insured, the exposure to large tort judgments may threaten their financial viability and the ability to provide essential transportation services to the public.[12]

4. The decision below also conflicts with prior administrative decisions holding that public transit agencies are not common carriers by railroad and that their labor relations are not governed by the Railway Labor Act, 45 U.S.C. §§ 151-188, but rather by state law. *See, e.g., State of Cal. v. Taylor*, 353 U.S. 553 (1957). In this respect, the decision below is directly contrary to those of the National Mediation Board, the entity which supervises labor relations in the railroad industry. The National Mediation Board has previously determined that the MTA is not covered by the Railway Labor Act despite its relationship with the LIRR and Metro-North. *See Application of Int'l Bhd. of Teamsters*, 8 N.M.B. 1, 3-4 (1980). The decision below also calls into question whether employees presently covered either by state retirement systems or by Social Security should instead be covered under the Railroad Retirement Act, 45 U.S.C. §§ 231-231v. However, the Railroad Retirement Board, which is the Federal agency that administers the Railroad Retirement Act, has determined that APTA member Massachusetts Bay Transportation Authority, which contracts with an independent contractor for commuter rail services, is not subject to the Railroad

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[11] *See* 101 Cong. Rec. E3622 (daily ed. Oct. 31, 1989) (remarks of Rep. Whittaker) (explaining that no-fault based state workers' compensation scheme is more cost-effective than the billion dollar a year cost of FELA to railroad industry).

[12] *See* 101 Cong. Rec. S9813 (daily ed. Aug. 2, 1989) (remarks of Sen. Kasten) (highlighting sharp increase in FELA verdicts).

Retirement Act because it does not actually operate the service.[13]

The decision below has the effect of rejecting years of court decisions, federal and state legislation, and administrative regulation. For example, state agencies that have acquired abandoned railroads, or those about to be abandoned,[14] have not even been considered common carriers unless they directly operated the trains. *See, e.g.*, 49 C.F.R. § 1150.22 (2002). And federal regulators have not considered private holding companies performing essentially the same management functions as MTA to be "carriers" under the Interstate Commerce Act. *See, e.g., Guilford Transp. Indus., Inc.*, 366 I.C.C. 294 (1982). Finally, Congress itself, in extending the benefits of FELA to additional railroad employees in 1939, expressly declined to broaden the definition of employers subject to the Act beyond direct operators of "going railroads." *Edwards*, 390 U.S. at 541.

The decision below, if not reviewed, will "dislodge settled rights and expectations [and] require an extensive legislative response." *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). The Court should therefore grant review to consider whether a public transit

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[13] *See* Memorandum of Deputy General Counsel, Railroad Retirement Board, to Director of Research and Employment Accounts (Oct. 31, 1990). A copy of that Memorandum is included as Appendix A hereto.

[14] For example, prior to becoming a subsidiary of MTA, the LIRR was a private railroad that became financially ruined as of 1965. As a result of its precarious financial situation, the State of New York assumed operations, ultimately acting through MTA. *See* Joseph J. Amato, *The MTA, It's Not "Going Your Way" — Liability of the Metropolitan Transportation Authority Under FELA: Greene v. Long Island R.R.*, 75 St. John's L. Rev. 113, 121 n.50 (2001).

authority operates a "going railroad" by performing certain management functions for a railroad subsidiary that do not involve directly operating the trains.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Appendix A

APPENDIX A

UNITED STATES GOVERNMENT RAILROAD RETIREMENT BOARD
MEMORANDUM L-90-160
OCT 31 1990

TO: Director of Research and Employment Accounts

FROM: Deputy General Counsel

SUBJECT: Massachusetts Bay Transportation Authority Employer Status

This is in response to your Form G-215 dated August 1, 1990, wherein you asked me to determine the status of the Massachusetts Bay Transportation Authority (hereafter MBTA) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. The employer status of MBTA has not previously been considered. The MBTA is a political and corporate subdivision of the Commonwealth of Massachusetts established in 1964 under section 2, Chapter 161A of the General Laws of that state. The MBTA has the authority to conduct mass transit operations within its area of operations. In a letter dated June 28, 1990, Mr. Ralph L. Duvall, MBTA's Director of Railroad Operations, advised the Board that MBTA has contracted with the National Railroad Passenger Corporation (hereafter Amtrak), an employer covered under the Acts, to operate 479.1 track miles used in commuter service. One of the commuter lines (the Attleboro line) crosses into Rhode Island. MBTA's contract with Amtrak went into effect on January 1, 1987. Amtrak employs 1031 people to provide MBTA commuter service. These employees are compensated and reported by Amtrak through its own payroll. Mr. Duvall further stated that MBTA is not subject to the jurisdiction of the Interstate Commerce Commission and its operations do not use any electric locomotive power. He also provided a copy of the

contract between MBTA and Amtrak which is currently in effect.

As you are aware, the definition of an employer is found un section 1(a) (1) of the Railroad Retirement Act (45 U.S.C. § 231 (a) (1)) and in a substantially similar provision of the Railroad Unemployment Insurance Act. An employer is defined, in pertinent part, to include:

> "(i) any express company, sleeping-car company, and carrier by railroad, subject to subchapter I of chapter 105 of Title 49 [the Interstate Commerce Act];
>
> (ii) any company which is directly or indirectly owned or controlled by, or under common control with, on or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, * * *."

In general, (former) Part I of the Insurance Commerce Act applies to common carriers engaged in the transportation of passengers or freight, wholly or in part by railroad, in interstate commerce. A governmental unit can be a common carrier so as to be an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. See Legal Opinions L–81–160 and L–90–47.

Subchapter I of Chapter 105 of Title 49, section 4(b), provides as follows:

> "(b) the Interstate Commerce Commission does not have jurisdiction under this subtitle over rail mass transportation provided by a local public body if –

(1) the Commission would have jurisdiction but for this section; and

(2) the fares of the local public body, or its authority to apply to the Commission for changes in those fares, is subject to the approval or disapproval of the chief executive officer of the State in which the transportation is provided." 49 U.S.C. § 10504(b).

Section 6, Chapter 161A of the Annotated Laws of Massachusetts provides that the affairs of MBTA shall be managed by a board of directors appointed by the governor of the state. Thus, in accord with 49 U.S.C. § 10504(b), the MBTA, like other providers of mass rail transportation, is not subject to the Interstate Commerce Act. However, Subsection (c) of that section provides as follows:

"Notwithstanding subsection (b) of this section, a local public body, described in subsection (b), is subject to applicable laws of the United Sates related to: –

(1) safety

(2) the representation of employees for collective bargaining; and

(3) employment retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers."

The Railroad Retirement and Railroad Unemployment Insurance Acts are laws of the United States related to "retirement, annuity and unemployment systems". Therefore, the exemption contained in 49 U.S.C. § 10504(b) is not applicable to a determination regarding coverage under the Acts administered by the Board. 49 U.S.C. § 10504(c), cited above, is a clear

statement by Congress that providers of urban mass transit such as the MBTA may, notwithstanding their exemption under subsection (b) from ICC jurisdiction, be subject to laws such as the Railroad Retirement and Railroad Unemployment Insurance Acts.

However, in the past this office has not held a rail carrier to be an employer unless it has actually commenced operating a railroad. See Legal Opinions L–81–160 and L–90–47. The MBTA is not a operator of a railroad and has never done so to this date. It is merely a subsidy disbursing entity of state government which contracts with a rail operator, currently Amtrak, to provide commuter service. Such service has been provided by rail carriers, including the Boston and Maine, under contract since MBTA's inception in 1964. Pursuant to its current contract, Amtrak presently provides all services, including equipment, maintenance, training and employees. Employees providing service under the contract are compensated by Amtrak and reported through its payroll. Under the contract, the MBTA has no control over the operations of the commuter service provided by Amtrak, except the limited right to modify the schedule.

Therefore, it is my opinion that the MBTA is not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. A new submission should be made if the MBTA should actually begin operating as a carrier by railroad. An appropriate Form G–215 is attached.

/s/ Steven A. Bartholow
Steven A. Bartholow

Attachment